EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Bernal Enterprises Ltd.
Operating as Country Style Donuts
(“ Bernal ”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2000/452 and 2000/453

DATE OF HEARING: September 21, 2000

DATE OF DECISION: October 12, 2000

DECISION

OVERVIEW

The appeals are pursuant to section 112 of the *Employment Standards Act* (the "*Act*") and by Bernal Enterprises Ltd. operating as Country Style Donuts ("Bernal", also, "the employer"). Bernal appeals two Determinations by delegates of the Director of Employment Standards (the "Director") both dated May 30, 2000. One of the Determinations (the "Corporate Determination") orders Bernal to pay Kathy Cavanaugh wages including compensation for length of service and interest totalling $1,522.08. In the second of the Determinations (the "Penalty Determination"), a penalty of $150 is assessed on the basis that it is the second time that Bernal has contravened the *Act*.

Bernal, on appealing the Corporate Determination, claims that Cavanaugh stands fully paid. And it claims that Cavanaugh was terminated for theft and that, as such, the liability to pay length of service compensation has been discharged.

In appealing the Penalty Determination, Bernal claims that as the Corporate Determination is in error, so is the Penalty Determination.

APPEARANCES

G. Briones	On behalf of Bernal
K. Cavanaugh	On her own behalf

ISSUES TO DECIDE

There are three issues, the matter of whether Cavanaugh is or is not owed wages for deliveries made on Saturdays and Sundays, the matter of whether Bernal did or did not have just cause to terminate Cavanaugh for reason of theft, and the matter of whether the Penalty Determination is or is not in order. What I must ultimately decide is whether the employer does or does not show that one or both of the Determinations ought to be cancelled, varied or referred back to the Director for reason of an error or errors in fact or law.

FACTS

Kathy Cavanaugh worked for about one and one-half years for the former owner of Country Style Donuts, Robin Stockfish. Bernal Enterprises purchased Country Style Donuts ("the restaurant") from Stockfish on or about the 12th of March, 1999.

In the period that Cavanaugh worked for Bernal, she was supervisor of the afternoon shift.

Cavanaugh is, in the Corporate Determination, awarded pay for deliveries made on 6 Saturdays and 6 Sundays, an hour on each of those days plus minimum daily pay pursuant to section 34 of the *Act*. The deliveries are said to have been to Langley Hospital and the Langley Civic Centre, in the main, and made on days off, at least, what were to have been days off. The delegate indicates that it is for deliveries made after the date when Bernal purchased the restaurant, but before Bernal bought its van, that pay is awarded. Lynn Lawrence, the former manager of the restaurant, is reported to have confirmed that Cavanaugh was indeed making deliveries on weekends in that period. The delegate also reports that Glen Briones of Bernal changed his story, claiming first that Cavanaugh volunteered for the work then, later, that the deliveries were during normal work hours.

Briones, on appeal, claims to have been misunderstood, that it takes only 7 minutes to drive from the restaurant to the hospital and the community centre, and that the deliveries that Cavanaugh made on Saturdays and Sundays were during regular work hours. As support for the latter claim, the employer draws attention to its record of hours worked and the fact that it shows that Cavanaugh did work on Saturdays and Sundays. But I find that the record of work shows that it was not until May 1, 1999, that Cavanaugh was assigned Saturday and Sunday shifts and that, even then, she worked only the occasional Saturday or Sunday. Bernal neither submits evidence which is obviously contrary to what Lawrence has had to say, shows me that Cavanaugh did not make deliveries as set out in the Corporate Determination, nor shows me that Cavanaugh was paid for deliveries made on day off. Cavanaugh, on the hand, submits additional evidence that she made deliveries as claimed. All of that considered, I accept that Cavanaugh did make deliveries on what were to have been her days off and that she has not yet been paid for the work.

Cavanaugh was terminated on November 19, 1999, for what Bernal claims to be clear evidence of theft. The employer claims that, contrary to what one would believe in reading the Corporate Determination, it has clear proof that Cavanaugh was stealing money from cash registers and feeding herself, her friends, and her husband and son without paying.

As a supervisor, Cavanaugh was to make sure that cash registers contained the correct float and sufficient change for each new shift. To that end, Cavanaugh was given a special key that allowed her to open any of the restaurant's cash registers. She was also given access to the locker in which where Bernal kept a stock of coins for making change.

Briones, on taking over Country Style Donuts, found that he was unable to reconcile the restaurant's daily take with the cash registers' record of sales. On looking for the reason or reasons for that, he found that, to a minor extent, it was due to the company's policy of not forcing customers to pay to the penny. He found that much of the discrepancy merely reflected the fact that the record of sales included void billing entries ("over-rings"). He assumed that the problem was to some extent due to the failure of employees to make correct change. Yet all of

that considered, it still seemed to Briones that money was missing, as much as $20 a day, and that led him to suspect theft.

The restaurant has a surveillance camera(s). Briones undertook a review of surveillance camera videos and found that the video for November 11, 1999, shows Cavanaugh, at the end of her shift, reaching into what I am told is the cash register of the night shift employee. She does that with her left hand and, on pulling it out of the cash register, she puts the hand in the left pocket of her clothing. According to Briones, that clearly proves that Cavanaugh is a thief, that Cavanaugh took either a loonie or a toonie from the cash register and put it in her pocket. I had the video played back and forth several times, and paused at various points, and it is my conclusion that the video is not clear proof of theft at all.

One cannot determine on the basis of the video whether Cavanaugh has or does not have something in her hand when she removes it from the till. For all that one can tell from the video, it is quite possible that Cavanaugh is merely checking to see what coins are in the cash register or even that what she does is deposit a coin or coins in the night shift till.

I realize that, on taking her hand out of the cash register, Cavanaugh puts it in her left pocket. But that is not evidence of theft. She may have only been searching for her key. Her next act is certainly consistent with looking for a key. The video shows her moving to another cash register, reaching into her right pocket, pulling out a key, and opening up that till.

Briones suggests that Cavanaugh's actions are odd and unusual. I find, however, that it is neither odd, nor unusual, that Cavanaugh did what she did. It was her job to see to it that the till contained the correct float and change. It was natural for her to do that at the end of her shift.

According to Bernal, Cavanaugh consistently failed to pay for food and drinks which she consumed or served to her friends, husband and son. In support of that allegation, Bernal produces notes and letters written by four of its current employees, at least, people that were employed at the time of the investigation. All say that Cavanaugh failed in some way to pay. Employees are, however, clearly open to both direct and indirect pressure from their employers. I have decided against attaching any great weight to the letters for that reason alone. But beyond that I find that it is unlikely that any of the employees were ever in a position to know whether Cavanaugh paid or not. They did not work the same hours as Cavanaugh.

Cavanaugh flatly denies that she ever failed to pay for anything and she is credible. I find that in explaining matters that she is consistent and forthright. Her version of events is logical and likely whereas I find that much of what Briones has to say, just does not add up.

ANALYSIS

Bernal claims that Cavanaugh stands fully paid but I am satisfied that, in the weeks following Bernal's purchase of the restaurant, she made several deliveries on what were to have been days off and that she has not been paid for the work. The delegate has concluded that

Cavanaugh made 12 deliveries in all. Bernal has not shown me that her decision is in any way in error.

The matter of whether it took Cavanaugh only 7 minutes to travel from the restaurant to and from the Langley Hospital and the Langley community centre or an hour is irrelevant. It is enough that the employee reported for work. The *Act* provides for minimum daily pay of 4 hours if the employee reports for work.

> *34 (1) If an employee reports for work on any day as required by an employer, the employer must pay the employee for*
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> *(a) at least the minimum hours for which the employee is entitled to be paid under this section, or*
>
> *(b) if longer, the entire period the employee is required to be at the workplace.*
>
> *(2) An employee is entitled to be paid for a minimum of*
>
> *(a) 4 hours at the regular wage, if the employee starts work unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions, … .*

The determination that Cavanaugh is owed minimum daily pay for work on 6 Saturdays and 6 Sundays is confirmed.

The matter of whether length of service compensation has or has not been discharged is a matter that turns on whether the employer shows or does not show that it had just cause in terminating the employee. Employers become liable for compensation for length of service when a person is employed for 3 consecutive months. The liability increases as the length of the employment increases but it can be discharged. That section of the *Act* is as follows:

> *63 (3) The liability is deemed to be discharged if the employee*
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> *(a) is given written notice of termination as follows:*
>
> *(i) one week's notice after 3 consecutive months of employment;*
>
> *(ii) 2 weeks' notice after 12 consecutive months of employment;*
>
> *(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for*

each additional year of employment, to a maximum of 8 weeks' notice;

(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or

(c) terminates the employment, retires from employment, or is dismissed for just cause.

A single act may be of such a serious nature that it justifies termination, as may less serious misconduct when repeated, or the chronic inability of an employee to meet the requirements of a job. Where there are repeated examples of less serious misconduct, it is the well established view of the Tribunal [See, for example, *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas* BC EST #D374/97.] that, in order to show just cause, an employer must show the following:

a) A reasonable standard of performance was established and communicated to the employee;

b) the employee was clearly and unequivocally notified that his or her employment was in jeopardy unless the standard was met;

c) the employee is given the time to meet the required standard; and

d) the employee continued to demonstrate an unwillingness to meet the standard.

Bernal is not claiming just cause for reason of repeated examples of misconduct. Its claim is that it had just cause for reason of theft, what is considered to be serious misconduct, a single act of which may justify an employee's immediate dismissal.

As noted above, I have found that Bernal's video is not clear proof of theft at all because it is not clear that Cavanaugh removes anything from the till. But a finding of theft would clearly require more than proof that she took a coin or two from a cash register. The employer must show that, on the balance of probabilities, there was a conniving on the part of the employee to deprive the employer of its money or some other asset. Given that it was Cavanaugh's job to check whether cash registers contained the correct float and adequate change, it follows that, even if it were shown that Cavanaugh took money from a till, a finding of theft would also require evidence which clearly established that, in doing so, she was knowingly acting to take, and planning to keep, the money. In this case, I find that the employer fails even to show that any money went missing on the 11th of November, 1999.

I have found that there is not clear evidence which shows that Cavanaugh failed to pay for food and drinks as alleged. But even if that had been shown, it would not necessarily follow that the employer had just cause. That would depend on the circumstances of the failure to pay. It could not be, for example, that she simply forgot to pay.

Bernal fails to show that it had just cause when it terminated Cavanaugh. It follows that it has failed to show that the liability to pay compensation for length of service has been discharged.

I am, for the forgoing reasons, confirming the Corporate Determination.

The Penalty Determination

In a Determination dated May 10, 2000, Bernal was found to have contravened the *Act*. That determination was not appealed.

In that I have decided to confirm the Corporate Determination dated May 30, 2000, it follows that Bernal has been found to have contravened the *Act* for a second time. Section 98 of the *Act* provides the Director with the power to impose penalties for repeated contravention of the *Act*.

> *98 (1) If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement imposed under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.*
>
> *(2) If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.*

The schedule of penalties is set out in section 29 of the *Employment Standards Regulation*. All that is required is that there be a previous contravention.

> ***29*** *(1) In this section, "specified provision" means a provision or requirement listed in Appendix 2.*
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> *(2) The penalty for contravening a specified provision of a Part of the act or of a Part of this regulation is the following amount:*
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> *(a) $0, if the person contravening the provision has not previously contravened any specified provision of that Part;*
>
> *(b) $150 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on one previous occasion;*

> (c) *$250 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on 2 previous occasions;*
>
> (d) *$500 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on 3 or more previous occasions.*

The employer in this case is not arguing the amount of the penalty, nor is it claiming that it has not previously contravened the *Act*. Bernal's claim is that the Penalty Determination should not have been issued because the Corporate Determination should not have been issued. I am satisfied that the Penalty Determination, like the Corporate Determination, should be confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the Corporate Determination dated May 30, 2000, and in the amount of $1,522.08, be confirmed and, to that, I add whatever further interest has accrued pursuant to section 88 of the *Act*.

I also order, pursuant to section 115 of the *Act*, that the Penalty Determination dated May 30, 2000, be confirmed.

Lorne D. Collingwood

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal